Lee Ying Piew & Ors v MP Tan Electrical & Credit Sdn Bhd

HIGH COURT (IPOH) - CIVIL SUIT NO 22-101-89
PEH SWEE CHIN J
27 JUNE 1989

Civil Procedure - Injunction - Application for interlocutory injunction - Claim related to trespass to land - Merits of claim clear - Whether there was need to establish serious questions to be tried - Whether balance of convenience must be considered - Whether damages an adequate remedy

Landlord and Tenant - Tenancy for agreed term - Conduct of parties prior to expiry of term - Whether new yearly tenancy intended upon expiry of term

The plaintiffs were the landlords of certain premises of which the defendants were the tenants. The issue before the court was whether, just before the period of tenancy in question was to expire, the conduct of the parties to the action had given rise to a new yearly tenancy in favour of the defendants as contended by the defendants but which was denied by the plaintiff. It was not disputed that the period of tenancy was to expire on 8 March 1989 and that the rent was payable monthly and in advance. Following negotiations between the parties the rent was reduced and later a rent collector for the plaintiffs obtained payment from the defendants of rent and issued a receipt dated 25 January 1989 to the defendants acknowledging receipt of the rent for 'January, February and March 1989.' Subsequently, the plaintiffs wrote to the defendants on 15 February 1989 reminding them of the expiry of the tenancy on 8 March 1989. On 28 February 1989, the plaintiffs wrote through their solicitors to the defendants to say that the deposit paid under the tenancy agreements had been deposited with the plaintiffs' solicitors for refunding to the defendants on 8 March 1989 immediately after the delivery of the premises to the plaintiffs. The defendants did not reply to the letters because they said that they were not obliged to vacate the premises due to the acceptance of the rent for the said three months. On 11 March 1989, they wrote to the plaintiffs enclosing a cheque for rent for April, May and June 1989. On 14 March 1989, the plaintiffs' solicitors wrote a letter returning the cheque and explaining that the receipt was for the following:

(i) rent for the period from 9 January 1989 to 8 February 1989;
(ii) rent for the period from 9 February 1989 to 8 March 1989; and
(iii) a replacement deposit of $4,062.90.

The defendants refused to surrender the premises to the plaintiffs and the plaintiffs then commenced an action against the defendants in which they applied for an interlocutory injunction restraining the defendants from remaining or continuing in occupation of the premises.

Held, allowing the application:

(1) A yearly tenancy or a tenancy from year to year can only arise in one of these ways: by express agreement or statute, both of which the court was not concerned with in this case, or by presumption of law. Such presumption of a yearly tenancy could arise when rent is paid on a yearly basis but this is subject to an all-important proviso that there are no circumstances to rebut such presumption.

(2) In the instant case, putting the case of the defendants at its highest, the rent paid was three months' rent. If at all such payment could give rise to any presumption of tenancy, it would be a quarterly tenancy for the rent was not paid on a yearly basis but on a quarterly basis. For this reason, the argument about a yearly tenancy, which was mysteriously hidden up the defendants' sleeve for some time and unrevealed, could not stand.

(3) The plaintiffs' claim to possession on the undisputed expiry of the term of the tenancy was so clear that the court ought to decide it at once in favour of the plaintiffs. Such being the case, the requirement that the applicant for an interlocutory injunction had to satisfy the court of a serious question to be tried and about the applicant having to satisfy the court on a balance of convenience pending the trial of such serious question would become unnecessary for the plaintiffs in the instant case on its special facts.

(4) In any event, the plaintiffs had shown a serious question for trial. The claim being related to trespass, damages would not be an adequate remedy and on the balance of convenience greater hardship would be caused to the plaintiffs by refusing the injunction.

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 02/204 of 1989.]

Cases referred to

1 *Allport* v *Securities Corp* [1895] 64 LJ Ch 491 (follld)
2 *Clarke* v *Grant* [1950] 1 KB 104 (CA) (follld)
3 *American Cyanamid* v *Ethicon Ltd* [1975] AC 396 (refd)

VS Visvanathan for the plaintiffs.
SY Lee for the defendants.

Cur Adv Vult

Peh Swee Chin J: I have granted an injunction on the application of the plaintiffs, (hereafter called 'the landlords'), the owners of two shop lots or two units of commercial space in a large commercial building complex known as Yik Foong Shopping Complex at Jalan Laxamana, Ipoh. I now give the grounds of my decision. Most probably at no risk of over-simplification, I will not refer to previous history of this case except when it is absolutely necessary, in order to save time.

The issue that confronted the court was whether, just before the period of tenancy in question was to expire shortly, certain conduct of the parties hereto had given rise to a new yearly tenancy, in favour of the tenant (the defendant) as contended on behalf of the tenant, but denied vehemently by the landlords, (the plaintiffs herein). The tenancy was originally a three-year tenancy, renewable only for another two years, but that too, was subject to a new or increased rent within certain limits, on which, nothing really turned. The relevant clause in the applicable tenancy agreement was as follows:

> 17 Upon the expiration of the said period of three years as mentioned in cl 1 above, the landlord shall grant to the tenant a further period of the said lot for a period of two years from the date of expiration of the said three years, but the rental shall then be agreed upon but any increase in the rental for such renewed period of two years shall not exceed 20% of the present rental of $2,420.50.

It would be pertinent to point out that the two shop lots were rented by the tenant and used as one shop or unit for its business. Further, both shop lots were covered by two separate but identical agreements, identical except for sums or figures mentioned therein. The rent for one shop lot was, eg $2,062.20 and the other, $2,000.70; again the deposit of rent for, inter alia, setting off against arrears of rent on the expiration of the term of tenancy was $4,841 for one shop lot and for the other, $4,326. It was not disputed that the period of tenancy of each of both shop lots would expire on 8 March 1989 and rent was payable monthly and in advance, ie from the ninth day of each month to the eighth day of the following month.

There was some delay in payment of rent possibly due to some renegotiation for reduced rents and both parties agreed with effect from 9 January 1989 until the expiry of the tenancy for both shop lots on 8 March 1989, the rents would be the sums as mentioned earlier and the tenant would have to vacate on or before 9 March 1989. On 15 February 1989, the landlords wrote to the tenant reminding it of the expiry of the period of tenancy on 8 March 1989, informing it of their intended use of the two shop lots for themselves and requiring it to vacate the same immediately after 8 March 1989.

On 28 February 1989, the landlords again through their solicitors, wrote to the tenant informing it of the deposit by the landlords with the said solicitors a sum of $9,167, being deposit (referred to earlier) for refunding to the tenant of the same on 8 March 1989 immediately after the delivery of possession of the two shop lots to the landlords. Before the two letters aforesaid were sent, a rent collector for the landlords apparently called on the tenant for payment of rent for the months of January, February and March 1989 which the tenant paid and for which the tenant was issued with a receipt which is reproduced as follows:

> Receipt No 1 Date: 25 January 1989
>
> Received From MP Tan Electrical & Credit Sdn Bhd the sum of dollars Twelve Thousand One Hundred and Eighty Eight & cts sen only $12,188 in payment of three months rental January, February & March 1989.
>
> Paid by Cheque No HHBB 426074
>
> 11 January 1989 Stamp Sgd

It would have to be borne in mind that the original tenancy for each tenancy agreement must have begun on the ninth of the month in which it began on the balance of probabilities because, when speaking of paying rent monthly, the monthly period for such rent would appear to be from the ninth day of any particular month to the eighth day of the following month. Thus, the renegotiated and reduced rents were agreed by both parties to be effective from 9 January 1989; and the undisputed expiry date of the original tenancy for each of the two shop lots was 8 March 1989 before the claim of the new one-year tenancy cropped up, this must be clear, notwithstanding that the landlords or their solicitors did not spell out the same clearly in these proceedings.

There was no reply to the landlords' two letters aforesaid because the tenants said that it was not obliged to vacate the two shop lots due to the acceptance of the three months' rent. It was in lawful occupation of the two shop lots and was not a trespasser. Then on 11 March 1989, the tenant wrote to the landlords forwarding a cheque for rent for April, May and June 1989. On 14 March 1989, the landlords' solicitors wrote to the tenant returning the said cheque and this time they explained the controversial receipt (reproduced herein earlier) in the following manner:

> Our clients have further instructed us to draw your attention on to the receipt issued by them to you on 25 January 1989. Though the said receipt refers to three months rental (January, February and March 1989) it actually meant and as you were fully aware, the following:
>
> (a) Rental for the period of 9 January 1989 to 8 February 1989.
> (b) Rental for the period of 9 February 1989 to 8 March 1989.
> (c) Replacement deposit of $4,062.90.
>
> Also you and your clients agreed that during the short period between 9 January 1989 and 8 March 1989 the rental for the said units would be at $2,062.20 per period for lot 22 and $2,000.70 per period for lot 23.
>
> What is crucially important was that it was agreed by you that you will hand over vacant possession of both the said units immediately after 8 March 1989. Indeed, our clients through their former solicitors' letters of 15 February 1989 and 28 February 1989 have stated their position in no uncertain terms.
>
> We have our clients' clear instructions to commence legal proceedings against you without any further delay for recovery of vacant possession of the said units together with damages interest and costs.

On 20 March 1989, the defendant through its solicitors, wrote to the landlords' solicitors, stating that the landlords' earlier letters dated 15 February 1989 and 28 February 1989 respectively were bad in law and that the refusal of the tender of rent by the tenant of rent for April, May and June 1989 amounted to a breach of tenancy and they further stated that 'the contents of the receipt speaks for itself ...', the receipt being the receipt reproduced above herein earlier.

In connection with the balance of convenience, the landlords said, inter alia, that three of themselves and the wife of another of themselves had been carrying on business under the name of 'Hanna Ladies Specialists Centre' at the premises adjacent to the two shop lots and in anticipation of the recovery of the two shop lots they had placed orders for goods some of which had arrived. Due to consequent lack of storage space, they had to rent another

space for $400 pm for the purpose while having had to delay or cancel the stocks that had not arrived. The tenant complained that it would be summarily evicted from the two shop lots where its business was carried on, and it had no alternative premises. The allegation of having no alternative premises would appear to be untrue as on Rajindran, a clerk of the landlords' solicitors, had sworn an affidavit to say that he had bought a 'Toshiba Walkman cassette player KT4018' for $99 from a shop of the tenant on the groundfloor of 'Parkson Complex', also at Jalan Laxamana, Ipoh. The tenant, while not denying it, said that the area was only 350 sq ft and was allowed there to trade in small electrical audio equipment only.

Then came the revelation of the tenant at the last moment by the last affidavit filed before the hearing before the learned registrar that by virtue of the said rent receipt, it claimed a one-year tenancy with effect from 9 January 1989 with rent to be paid on a quarterly basis because, the landlords had requested for and received rent 'beyond the period of the earlier tenancy'. The reference by the tenant to the request for and the receipt of rent 'beyond the period of the earlier tenancy' must necessarily mean that rent was accepted for a period beyond 8 March 1989 and up to 31 March 1989, a period of about 22 days, not covered by the expiring tenancy agreements for both shop lots.

Learned counsel for the landlords submitted that the receipt issued by their clients' rent collector had been explained by the letter dated 14 March 1989 to the tenant, being exh LLY-6 to encl 2, (reproduced above); that further there was no mention earlier of a yearly tenancy, which was therefore an afterthought. Further, there was no reply to two earlier letters sent on behalf of the landlords and that the payment of rent for the months of January, February and March 1989 was the first tender of rent to the landlords, (successors-in-title of previous owners vis-a-vis the tenant).

Learned counsel for the tenant submitted that the explanation for issuing the rent receipt in the manner in question had come a full month after its issue. The receipt issued was for (full) three months' rent. He submitted further it was a yearly tenancy with rent to be paid quarterly. He submitted that for a mandatory injunction on an interlocutory application, the landlords' case must be crystal clear or must be unusually strong.

In my view, a mandatory injunction on an interlocutory application is rarely granted in the absence of special circumstances. One of the special circumstances is where the case is clear and which the court thinks ought to be decided at once, *Allport* v *Securities Corp.*[1] In fact it was the submission of the learned counsel for the tenant that it could be granted where the case was crystal clear or must be unusually strong. Bearing this in mind, the court considered the facts and law in this case, as to whether the instant case could be so categorized.

A yearly tenancy or tenancy from year to year can only arise in one of these ways: by express agreement, or statute, with both of which the court was not concerned in this case, or by the presumption of law. Such presumption of a yearly tenancy could arise when rent is paid on a yearly basis but this is subject to an all-important proviso that there are no circumstances to rebut such presumption. In the instant case, putting the case of the tenant at its highest, the rent paid was three months' rent. If at all such payment could give rise to any presumption of tenancy, it would be a quarterly tenancy for the rent was not paid on a yearly basis but on a quarterly basis. For this reason, the argument about a yearly tenancy which was mysteriously hidden up the tenant's sleeve for some time and unrevealed, could not stand.

If it could give rise to a presumption of a quarterly tenancy, could such presumption and for that matter, the presumption of a yearly tenancy as contended for also, be rebutted by the circumstances in the instant case? First the circumstances must show on a balance of probabilities, that when three months' rent was paid, it was the intention of both parties to create a new tenancy. Thus in *Clarke* v *Grant*,[2] at p 106, the landlord's agent there accepted rent because he mistakenly believed it to be paid in arrear and therefore referable to a period before the expiry of the lease there, whereas the tenant purported to have paid it in advance. It was held that such circumstances had no effect on the notice to quit there, and Lord Goddard CJ at p 106, said:

> It is impossible to find that the parties here intended that there should be a new tenancy. The landlord was all the time desiring to have possession of the premises: that is why he had given his notice to quit. The mere mistake of his agent in accepting as rent which had already accrued rent which was in fact payable, if it was payable at all, in advance, cannot be used to establish that the landlord was agreeing to a new tenancy.

In the instant case, the rent that was paid was paid before the expiry of the respective period of tenancy for the two shop lots. The rent meant by the landlords to be received was from the period, from 9 January 1989 to 8 March 1989, but the rent receipt in question described rent received as for January, February and March 1989. In common parlance, the wording of the receipt would be quite acceptable, and to the parties it should be quite intelligible. The tenant appeared to have tried to split hair in order to prolong the expiring tenancy. In the *Clarke* case,[2] the tenancy ceased on account of the notice to quit, here it would cease, of course, without a notice to quit at the end of the agreed term or period, and nothwithstanding this difference, the underlying principle in the *Clarke* case equally applied. The instant case must be distinguished from those cases in which a tenant holds over

after the end of term and pays rent and in the absence of rebutting circumstances, the court implies that the tenant holds upon such terms of the old lease etc. In the instant case, the controversial rent was paid before the end of the term or period.

The aforesaid conclusion could be put in another way which would show my thinking in detail about it, ie that the landlords' claim to possession on the undisputed expiry of the term of tenancy was so clear that the court ought to decide and did decide it at once in favour of the landlords. Such being the case, Lord Diplock's requirements as stated in *American Cyanamid* v *Ethicon Ltd*[3] about the applicant for an interlocutory injunction having had to satisfy the court of a serious question to be tried and about, pending the trial of such serious question, such applicant having had to satisfy the court on a balance of convenience would become unnecessary for the landlords in the instant case on its special facts.

In case I was wrong on the above reasoning, I had considered that in any event, the landlords had shown a serious question for trial; that the claim being related to trespass, damages would not be an adequate remedy, and that on the balance of convenience, greater hardship would be caused to the landlords by refusing the injunction on a consideration of facts set out earlier in connection with such balance of convenience. I therefore granted the injunction restraining the tenant from remaining or continuing in occupation of the said two shop lots; ordering also a suspension for one month of the operation of the said injunction order to enable the tenant to vacate from there and costs.

Application allowed.

Solicitors: *Kean Chye & Sivalingam; Maxwell, Kenion, Cowdy & Jones.*

Reported by *PS Ranjan*

Roxy Electric Industries (Malaysia) Bhd v Syarikat Nominee Bumiputra Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) - CIVIL SUIT NO D4-22-926-89
ZAKARIA YATIM J
9 JUNE 1989

Companies and Corporations - Extraordinary general meeting - Requisition and notice issued by shareholders holding more than 10% of issued capital - Whether requisition and notice bad in law - Whether defendants acting in concert - Whether there was takeover of company - Companies Act 1965, ss 144 & 179 - Malaysian Code on Takeovers and Mergers 1987, r 2

Civil Procedure - Company applying for injunction to restrain meeting - Whether test in American Cyanamid applicable - Plaintiffs to show strong case - Whether grant would give judgment to plaintiffs - Risk of injustice

Words and Phrases - 'Members' - 'Takeover' - 'Acquirer' - 'Acting in concert' - Companies Act 1965, ss 16 & 179, Malaysian Code on Takeovers and Mergers 1987

The plaintiffs applied for an injunction against the first and second defendants from convening, calling, holding or conducting an extraordinary general meeting of the plaintiffs for any or all of the purposes and objects set out in the notice of requisition issued by both defendants, and from removing or attempting to remove or taking steps to alter the composition of the plaintiffs' board of directors. On 4 April 1989, a requisition for an EGM of the plaintiffs under s 144 of the Companies Act ('the Act') accompanied by a special notice of several resolutions intended to be tabled were served on the plaintiffs by the fourth defendant. The requisition stated that the first and second defendants were the registered holders of ordinary shares in the plaintiffs representing more than 10% of the total voting rights. The resolutions to be considered at the EGM were for the purpose of removing the five existing directors of the plaintiffs and appointing the seventh to twelfth defendants as directors. The plaintiffs contended that the requisition and notice were bad in law as they did not bear the common seals of the first and second defendants and were not executed by authorized representatives. Further, the requisition and notice was not a bona fide move to hold a meeting of the plaintiffs' shareholders but an attempt on the part of the defendants to take over the plaintiffs.

Held, dismissing the application:

(1) Section 144(2) of the Act states that the requisition shall state the objects of the meeting; it shall be signed by the requisitionist, and it shall be deposited at the registered address of the company. There was no ambiguity in the objects of the meeting as the requisition expressly stated that the meeting was for the purpose of considering and, if thought fit, passing the resolutions stated therein. By affidavits filed on behalf of the first and second defendants, it was averred that the requisition was executed and/or signed by persons duly authorized to execute the documents on their behalf. Neither the Act nor the articles of association of the plaintiffs required the documents to bear the common seals of the requisitionists.

(2) It was admitted by the plaintiffs that the first and second defendants were registered owners of more than 10% of the plaintiffs' total issued and paid-up share capital as at 4 April 1989. Once shares were registered in their names they became